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United Nations Commission on International Trade Law

Thirty-fifth session

Summary record of the 743rd meeting
Held at Headquarters, New York, on Wednesday, 19 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

02-43320 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.20 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 11. Admissibility of evidence in other proceedings

1. **The Chairman** said that the United States delegation had asked for further discussion of draft article 10 of the Model Law to be deferred to allow that delegation to continue consultations and propose a form of wording which satisfied all the delegations and observers. He proposed to move on to consider draft article 11, and invited comments, beginning with the first paragraph of that article.

2. **Mr. Inoue** (Japan) said that his comment centred on the range of third persons referred to in paragraph 1 of draft article 11. While paragraph 61 of the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514) suggested that such "third persons" were only those involved in the conciliation proceedings, paragraph (1) of draft article 11 suggested that "third persons" referred to a wider circle, not just those involved in the conciliation proceedings. Paragraph (1) also provided that unless the parties agreed otherwise, all third persons' evidence was inadmissible in another forum, whether they were involved in the conciliation proceedings or not. He interpreted that as meaning that the parties could agree to make inadmissible the evidence of persons who, for example, coincidentally happened to know the content of the conciliation procedure. He therefore suggested that the phrase "or a third person" should be moved from its current location in paragraph (1) and be inserted after the first clause of that paragraph, so that it read "(1) Unless otherwise agreed by the parties, a party *or a third person* that participated in the conciliation proceedings ...".

3. **Mr. Sekolec** (Secretary of the Commission) explained that the phrase "or a third person" had originally been inserted to cover third persons — for example, administrative staff or experts — participating in conciliation proceedings, but not considered actual parties to those proceedings. He said that not much thought had been given to the location of the phrase at that time and agreed with the delegation of Japan that it could be moved.

4. **The Chairman** said that the change suggested by the delegation of Japan appeared to make the wording of paragraph (1) clearer and asked if there were any objections to adopting it.

5. **Ms. Moosa** (Singapore) said that her doubts over the Japanese proposal related to whether or not it covered bodies such as conciliation institutions, which often provided facilities and acted as depositaries for documents, including conciliation agreements. They were not themselves participants in conciliation, and she wondered if the intention was for paragraph (1) of to apply to them regardless.

6. **The Chairman** pointed out that the concern raised by the delegation of Singapore was not so much connected with the suggested change but with the text itself. To his recollection, when paragraph (1) was being drafted, the possibility raised by the representative of Singapore was not even contemplated.

7. **Mr. Marsh** (United Kingdom) asked whether his delegation had correctly assessed the impact of the Japanese proposal. If, for example, a party involved in a conciliation proceeding acquired information and relayed it to a third party not involved in that conciliation proceeding, he wondered if that third party would then be entitled to introduce the information into other proceedings. If that was indeed the case, his delegation would be concerned at the narrowing of the scope of inadmissibility, as it believed that the emphasis was not so much on the third parties, as on the information. He stressed that paragraph (5) of draft article 1 would apply in any event.

8. **Mr. Slate** (American Arbitration Association) said he wished to take up the issue of institutions' connection with conciliation proceedings. In arbitration, it was increasingly common for the personnel of arbitral institutions to be subpoenaed, or for documents to be sought, when an arbitration ended up in court. Accordingly, the inclusion of language to cover personnel involved in a proceeding or documents filed with an institution might be advisable, to extend protection to them.

9. **Mr. Shimizu** (Japan) said that to clarify the purpose of his delegation's proposal, he wished to emphasize that the intention was not to change the substance of what had been agreed in the Working Group. He had inferred from the last sentence of paragraph 61 of the draft Guide that the phrase "or a third person" was simply intended to include individuals such as witnesses or experts in the scope of paragraph (1) of draft article 11. That being the substance of the issue, he felt that the language of paragraph (1) would be clearer if the phrase in question was moved. A further argument in favour of such a change was that it would be difficult to explain, in terms of contract law, why a third person uninvolved in any way with a conciliation proceeding should be bound by what was agreed between the parties in that conciliation proceeding. Moving the phrase "or a third person" would make it clear that the "third person" in question had to be a participant.

10. **Mr. Gillen** (International Cotton Advisory Committee), referring to the issue raised by the delegation of Singapore, echoed Mr. Slate's view that individuals involved in nothing more than administering arbitration (in other words, not involved as parties) would often be called upon to appear before a tribunal at some later date, but that in the specific case of conciliation, there might be grounds for affording such administrative personnel some protection.

11. **Mr. Zanker** (Observer for Australia), returning to the issue of the Japanese proposal, wondered whether the phrase to be moved within paragraph (1) should not be "or a third person, *including a conciliator*" rather than simply "or a third person", in order to adhere more closely to the logic of that proposal. The other observations regarding individuals peripherally involved in a conciliation proceeding might be accommodated by adding to the amended phrase wording along the lines of "or a third person that participated in, *or was associated with the administration of*, the conciliation proceedings", so that they would be covered by the privileges set out in paragraph (1), subparagraphs (a) to (f), of draft article 11.

12. **Mr. Getty** (United States of America) endorsed the representative of Singapore's suggestion of including conciliation institutions in paragraph (1). With regard to the issue of moving the phrase "or a third person" to another location within the existing paragraph (1), his delegation believed that the Commission needed to be as broad and inclusive as possible. Retaining the existing wording was the best way of averting the risk that information relayed to a third party not a party in, or not present at, a conciliation proceeding might later be used or be required to be used by virtue of that third party not being an actual participant in the conciliation.

13. **Mr. Lebedev** (Russian Federation) said that his impression from listening to the opinions of the delegations of the United Kingdom and United States was that the Japanese proposal had implications of substance; it was not just cosmetic. As it stood, paragraph (1) meant that a party that was not a direct participant in a conciliation proceeding could not rely on evidence acquired from that conciliation proceeding, and that no court or tribunal could therefore accept such evidence. The current wording was very broad; the risk of accepting the Japanese proposal was that the wording would become more restrictive, applying only to third parties which took part in the conciliation proceeding.

14. Before adopting or rejecting that proposal, he thought it wise for the Commission to exercise some forethought and decide what it wished paragraph (1) to achieve, how it wished the provision to be used and to whom it wished it to apply (any third parties, or only third parties involved in the conciliation proceeding). If the desire was to restrict its scope, then the Japanese proposal should be accepted as entirely logical. If the desire was to give it the widest possible scope, the existing wording should be retained.

15. **Mr. Barsy** (Sudan) said that the goal was to protect the information and views presented during conciliation proceedings. The phrase "or a third person" should be retained, but a limit could justifiably be placed on which third persons were covered, depending on how they obtained information: in the instance in question, information received by submitting it during a conciliation proceeding.

16. **The Chairman** said his impression was that the members of the Commission favoured applying the provisions of paragraph (1) to any third party in receipt of information about a conciliation procedure, whether or not that third party h[illegible] been a participant. That would include personnel of institutions which administered conciliation proceedings. If he heard no objections, he would take it that the existing wording

was considered approved, and the drafting group would be entrusted with formulating wording which expressed the Commission's view.

17. **Ms. Brelier** (France) questioned the wisdom of leaving the matter in the hands of the drafting group, because the Japanese proposal had implications not just of form, but of substance.

18. **Mr. Holtzmann** (United States of America) requested that consideration should be given to replacing the phrase "party *to* the conciliation" in the English version of paragraph (1) (b) of draft article 11 with the phrase "party *in* the conciliation", to correct what appeared to be a typographical error.

19. **The Chairman**, responding to Ms. Brelier, said that the Commission could waste a great deal of time on drafting when it was the drafting group that had a clear mandate to perform that task. Whatever it proposed subsequently returned to the Commission for review. The solution was not being adopted to delegate a task to the drafting group, but to make more rational use of the Commission's time. Responding to Mr. Holtzmann, he said that he and the Secretary of the Commission would examine the typographical error.

20. **Mr. Sekolec** (Secretary of the Commission) said that what the drafting group would be discussing was not the Japanese proposal (though it was consistent with the history of the provision), but the substantive decision to broaden the scope of paragraph (1) to encompass parties to a conciliation proceeding, other participants in a conciliation proceeding and parties that, while not participants in a conciliation proceeding, were connected with it in some other way.

21. **Mr. Morán Bovio** (Spain) agreed with the assessment of the discussion made by the Chairman and by the Secretary of the Commission, and with the decision to leave the matter to the drafting group, which had a clear mandate and which would in any event be reporting back to the Commission.

22. *Paragraph (1) of draft article 11 was provisionally approved.*

23. **The Chairman** said that paragraph (2) of draft article 11, was a corollary of paragraph (1) and was intended to allow for the inclusion of information submitted orally or electronically.

24. *Paragraph (2) of draft article 11 was provisionally approved.*

25. **The Chairman** invited comments on paragraph (3), which referred to the use of the information in question by courts and tribunals and had also been discussed at length by the Working Group.

26. **Ms. Moosa** (Singapore) requested clarification of the word "law" in the last sentence of paragraph (3), asking whether the intention behind it was to include court orders mandating disclosure of information. If that was indeed the case, her delegation would have concerns over the word itself, and over the policy. Its view was that "law" should refer only to written law or legislation.

27. **The Chairman** said that his view, in the light of the first part of paragraph (3), was that "law" referred to a statute or written law. He hoped that if this interpretation was not correct, a member of the Commission would clarify it. If the matter caused a problem, it could be dealt with in the Guide.

28. **Mr. Reyes** (Colombia) asked for the drafting group to consider replacing the two occurrences of the word "*revelar*" in the Spanish version of paragraph (3) with the word "*divulgar*". The request was made in the interests of consistency with decisions made regarding the same concept when the Commission had discussed article 9 of the draft Model Law (A/CN.9/SR.742).

29. **Mr. Sekolec** (Secretary of the Commission) requested Commission members to mark foreign language changes by hand and submit them to the drafting committee.

30. *Paragraphs (3), (4) and (5) of draft article 11 were provisionally approved.*

Draft article 12. Termination of conciliation

31. **The Chairman** said that the draft article was based on practice and on the rules of arbitral institutions.

32. **Ms. Moosa** (Singapore) suggested adding a catch-all phrase to cover less formal situations, such as an oral agreement between the parties, abandonment of the conciliation proceeding by one party or an apology tendered by one party and accepted by the other.

33. **Mr. Holtzmann** (United States of America), agreeing with the representative of Singapore, suggested that the word "written" should be deleted from subparagraphs (b), (c) and (d), since the

requirement of a formal written statement was not specified elsewhere in the draft Model Law.

34. **Mr. Zanker** (Observer for Australia) supported the United States proposal to delete "written" but wondered whether another subparagraph should be added to cover termination by abandonment and other developments which occurred at the parties' initiative rather than through the participation of a third person.

35. **Mr. Reyes** (Colombia) supported the proposals made by the Singaporean and United States delegations, noting that, elsewhere in the Draft Model Law (for example, in draft article 10), there was no explicit reference to written declarations, and that other possibilities were covered by the phrase "by any other means".

36. As for the title of the draft article, it would be more consistent with the rest of the draft Model Law to say "termination of conciliation proceedings". In his country a distinction was drawn between a conciliation (or conciliation hearing), in which the parties met in an effort to arrive at a conciliation and forge a settlement, and the actual conciliation proceedings, which began with the submission of a written or oral request.

37. **Mr. Morán Bovio** (Spain) agreed with the Singaporean proposal and the United States suggestion for implementing it; however, the deletion of "written" should not preclude recourse to written, or even notarized, declarations if warranted. The deletion of "written" also addressed the reservations expressed by the Observer for Australia.

38. He supported the proposal by the representative of Colombia concerning the title of the draft article, which would bring it into line with the rest of the text. The same change should be made to the current English title, "Termination of conciliation".

39. **The Chairman** said that the distinction between conciliation and conciliation proceedings was not completely clear, since both terms implied some sort of settlement.

40. **Mr. Möller** (Observer for Finland) expressed support for deleting "written", even though it might have been stated expressly in previous arbitration or conciliation rules; after all, the thinking had since evolved. He was reluctant to make any further changes; for example, specifying that the conciliation had been reached through "conduct" could give rise to other problems.

41. **Mr. Sekolec** (Secretary of the Commission) suggested that the Commission should consider the consequences of a decision to allow termination by other means — such as an oral agreement, conduct or abandonment — in the wider context of articles 9, 10 and 11, or in a situation where the enacting State was contemplating suspension of the limitation period. While the conciliation rules were for the most part very flexible, the Working Group had felt that a written declaration was necessary in draft article 12 to establish absolute certainty that the proceedings had been terminated.

The meeting was suspended at 11.25 a.m. and resumed at 12.10 p.m.

42. **The Chairman** said that, following informal consultations, most delegations appeared to favour the United States proposal but that views had been expressed on other aspects of the draft article.

43. **Mr. Jacquet** (France) said that, while his delegation would join the consensus on the United States proposal, its support would be less than enthusiastic. Drawing attention to subparagraph (d), he said that, where a conciliation clause had been inserted in a contract, both parties were required to make some minimum effort at conciliation; thus, a party should not be allowed, by a mere oral declaration, to terminate proceedings which had not even begun. To avoid that undesirable eventuality, he proposed adding "within a reasonable time period" after "other party" (which was preferable to permitting the obligation to be discharged through a single meeting of the parties).

44. **Mr. Heger** (Germany) said that his delegation, too, would support the United States proposal in a spirit of consensus but that it would have preferred to retain "written" in order to pre-empt suspension of the limitation period, which was a well-known consequence in German law.

45. **Mr. Lebedev** (Russian Federation) pointed out that the Working Group had opted, after meticulous discussions, to specify "written declarations" not only because of the wider consequences referred to by the Secretary of the Commission but also in relation to article 14, which dealt with the impossibility of initiating judicial or arbitral proceedings where the parties had already reached an agreement in conciliation proceedings. A clear-cut written declaration would be particularly important in the cases set out in subparagraphs (b), (c) and (d), where the

parties could not reach an amicable settlement and judicial or arbitral proceedings would necessarily be the next step.

46. If the Commission decided to delete "written" — even though most Commission members were also Working Group members and had previously agreed on the importance of the term — it was highly likely that individual States, in adopting the Model Law, would find it necessary to reinstate it. That would certainly be the case for his delegation.

47. In subparagraph (d), an indication of absolute certainty would also be necessary in cases where, as the Observer for Australia had hypothesized, one of the parties was persistently passive (for example by not responding to letters and otherwise remaining silent) and hence the declaration of termination was, in effect, a unilateral statement by one party.

48. **Mr. Maradiaga** (Honduras) said that he wished it to be placed on record that he was not convinced it would be appropriate to eliminate the word "written". Under Germanic Roman law much importance was placed on the existence of a document which faithfully reflected the content of agreements.

49. **Mr. Graham** (Mexico) said that even though his delegation had agreed that the word "written" should be deleted, it assumed that professionals in conciliation proceedings would normally wish to ensure that a written declaration was made.

50. With regard to the concept of abandonment of proceedings, he suggested that slight adjustments could be made to subparagraphs (b) and (d) to take the reasonable intent of parties to carry out consultations into consideration, without the need to insert an additional subparagraph. In his opinion, subparagraphs (b), (c) and (d) already provided an adequate structure and clearly identified the three variants.

51. **Mr. Holtzmann** (United States of America), in reference to the issue of abandonment of conciliation proceedings or conduct of parties, said that one possible solution would be to leave the word "written" in subparagraphs (b), (c) and (d) and to insert a subparagraph (e) referring to the conduct of the parties in the event that one or more parties considered the conciliation terminated. If that additional subparagraph were not inserted, then the word "written" should in fact be deleted from subparagraphs (b), (c) and (d).

52. With respect to the suggestion made by the representative of France on contractual agreements requiring parties to conduct conciliation proceedings for a period of time, he said that the parties to a dispute had the option to make such contracts, at their discretion, but he believed that it would not be appropriate for the draft Model Law to attempt to specify such time periods. In order for conciliation to be effective, all parties must have the will to ensure that it produced positive results, otherwise the exercise would prove futile.

53. Commenting on the German delegation's support for retaining the word "written" in subparagraphs (b), (c) and (d), he said his delegation agreed that there was often a need to precisely state the timing of termination, in particular for States which had adopted article X, the footnote article to article 4. Likewise, there was also a need for precision in the definition of the commencement of proceedings. He hoped that the draft Guide to Enactment would point out that States wishing to adopt article X should give careful consideration to precisely defining the commencement and termination of proceedings.

54. The representative of the Russian Federation had pointed out that although subparagraph (b) required that the conciliator should consult with the parties, the provisions of that subparagraph would cease to operate in the event that one of the parties refused to appear for consultation. His delegation believed one possible solution would be to replace the phrase "after consultation with the parties" with "after inviting the parties to conciliate".

55. **Mr. Möller** (Observer for Finland) welcomed two of the United States proposals, firstly, that subparagraph (b) should be amended, inviting the parties to conciliate, and secondly, that the Model Law should not specify a time period for conciliation. However, his delegation strongly opposed the addition of subparagraph (e) if the word "written" were to be retained, as that would lead to the potential difficulties as raised earlier by the Secretary of the Commission.

56. **Mr. Barsy** (Sudan) said that the word "written" in subparagraphs (b), (c) and (d) was very important because it gave precision to the termination of the conciliation proceedings. Moreover, the suggestion with respect to inviting the parties to consult could pose certain difficulties. For instance, undue delays could arise in the event that communications inviting

the parties to such consultations did not reach their intended destination in a timely fashion.

57. **The Chairman** said that in spite of some objections expressed by delegations, the prevailing view was that the word "written" should be deleted. On the other hand, the proposal to add a subparagraph on conduct of the parties had not garnered much support, even though there was some concern for situations in which one of the parties to a dispute might refuse to cooperate with the proceedings. In that regard, discussion was expected to continue on the proposal that subparagraph (b) should be modified to enable a conciliator or panel of conciliators to invite the parties to hold consultations.

58. Moreover, one comment had been made to the effect that, in the presence of a conciliation agreement, proceedings could not be terminated before a minimum period had elapsed and a certain amount of effort had been exerted. In reaction to that comment, it had been suggested that the consequences of the failure to comply with a conciliation agreement related to contract law and therefore fell outside the purview of the draft Model Law.

59. **Mr. Markus** (Observer for Switzerland) said he wished to endorse the views expressed by the Observer for Finland, and especially to state his strong opposition to the addition of a subparagraph on conduct or abandonment of proceedings. Furthermore, he favoured the deletion of the word "written". It was important to find a middle ground between excessive formality and uncertainty. He entirely agreed with the idea of maintaining consistency throughout the Model Law: if it were determined that time limitations should be specified with respect to the termination of proceedings, then a similar clause should be introduced in article 4.

60. As for the French proposal, if an agreement had been reached, article 14 might appropriately have been used to enforce such agreement. Otherwise, it would be impossible to force parties to meet if either party was unwilling to do so.

The meeting rose at 1 p.m.

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United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 744th meeting
Held at Headquarters, New York, on Wednesday, 19 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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02-43326 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 12. Termination of conciliation (continued)

1. **Mr. Jacquet** (France) said that he understood the concern that the reasonable period of time proposed by his delegation with regard to draft article 12 (d) was unacceptable, since it was a matter for the contract, not for the draft Model Law. However, in his view, it was unwise to make such a clear distinction between the contract between the parties establishing conciliation and the conciliation process covered by the draft Model Law. There were two situations in which parties could abandon conciliation, presenting an irritating problem for the draft Model Law. Firstly, if a party refused to participate from the outset, draft article 4 provided for a failure to respond to an invitation within 30 days to be treated as a rejection of the invitation to conciliate, without elaborating on the consequences of rejection. Secondly, if a party abandoned without warning a process that had already begun, the situation would be covered by the provisions of draft article 12, subparagraphs (b) or (d). The proposal by the representative of Finland to insert the words "after inviting the parties to conciliate" into subparagraph (b) was superfluous, because draft article 4, rather than 12, would contain the relevant provisions if conciliation had never even begun.

2. **The Chairman** said that there was a consensus to retain the version of draft article 12 formulated by the Working Group, with the exception of removal of the term "written". The Guide to Enactment would contain an explanation that the consequences of failure to fulfil an agreement to conciliate would derive from the law applicable to that agreement. The Finnish proposal to amend subparagraph (b) was likely to create confusion in the light of the identical provisions of article 15 of the UNCITRAL Conciliation Rules.

3. *Draft article 12 was provisionally approved.*

Draft article 13. Conciliator acting as arbitrator

4. **Mr. Zanker** (Observer for Australia) said that the clause "unless otherwise agreed by the parties" was superfluous. In line with the practice followed in previous articles, it should be removed.

5. **Mr. Marsh** (United Kingdom) said that the description of "another dispute that has arisen from the same contract or any related contract" was slightly too narrow. It was possible for another dispute to arise from the same factual situation, without necessarily having any contractual relationship, in accordance with the provisions of draft article 1, paragraph (2), which referred to disputes relating to a contractual or other legal relationship.

6. **Mr. Shimizu** (Japan) asked whether "another dispute" referred to disputes between the same or different parties.

7. **The Chairman** explained that the Working Group intended "another dispute" to cover disputes between the same as well as different parties.

8. **Mr. Tang** Houzhi (China) said that, in the view of his delegation, the words "unless otherwise agreed by the parties" were extremely important. It should be possible for parties, having failed to reach a settlement after conciliation, to agree to pursue the process with the same person as arbitrator. The draft Model Law should respect the right of the parties to make such private agreements. If draft article 13 could not be retained in its entirety, it should be deleted altogether.

9. **The Chairman** explained that the deletion of the clause "unless otherwise agreed by the parties" did not mean that draft article 13 was therefore mandatory. The provisions of draft article 3, allowing parties to vary the text by agreement, could still be applied. He asked delegations to bear in mind that such changes were merely cosmetic.

10. **Mr. Holtzmann** (United States of America), supporting the view expressed by the representative of China, said that it was useful to remind parties of their right to vary the provisions of draft article 13 by agreement, instead of requiring them to discover that right by reading a different article. It was particularly important for China, given that in hundreds of cases each year under its jurisdiction, arbitration was combined with a conciliation in the same procedure. That process lay at the core of dispute resolution in China and played a key role in facilitating international

trade. Moreover, the current version of the text had after all been established following detailed discussion in the Working Group, and no strong reasons had been offered to justify changing it.

11. In response to the point made by the representative of the United Kingdom, he suggested amending the text to "another dispute that has arisen from the same or related contract or legal relationship".

12. **Mr. Rendón** (Mexico) asked whether it was advisable to change the wording of article 19 of the UNCITRAL Conciliation Rules in the formulation of draft article 13. While they were almost identical in other respects, the words "or as a representative or counsel of a party in any arbitral or judicial proceedings" had been omitted from the current version of draft article 13.

13. **The Chairman** said that, while he failed to recall the reason for the omission, the matter had been properly discussed in the Working Group.

14. **Mr. Reyes** (Colombia) agreed that there should be a good reason for departing from the wording of article 19 of the UNCITRAL Conciliation Rules in draft article 13. Moreover, the heading of draft article 13 was inappropriate. Rather than "Conciliator acting as arbitrator", the heading should be closer to "Ineligibility of the conciliator as arbitrator", since the current heading did not reflect the content of the article.

15. **The Chairman** said that paragraphs 117 and 118 of the report of the Working Group (A/CN.9/506) contained an explanation for the omission of the words pointed out by the representative of Mexico.

16. **Mr. García Feraud** (Observer for Ecuador) said that even though article 3 allowed for the possibility of changing the rules, the phrase "unless otherwise agreed by the parties" should still be included in other articles. Although draft article 13 established a general rule to the effect that the conciliator should not act as an arbitrator, the fact was that in practice, an agreement by the parties to allow a conciliator to become an arbitrator would be an indication of their confidence in the conciliator's competence and ethical behaviour. With regard to the incompatibility of dealing with matters pertaining to the same contract or any related contract , it might be useful to refer not only to the possible legal relationship with the matter previously dealt with in the conciliation process but also to the legal situation itself. He suggested that the last part of draft article 13 should read as follows: "in respect of another dispute that has arisen from the same contract *or any other contract or legal relationship or situation*".

17. **Mr. Morán Bovio** (Spain) pointed out that paragraph 117 of the report of the Working Group (A/CN.9/506) explained the reasons that had led the Working Group to adopt the present text of draft article 13. That text, including the phrase "unless otherwise agreed by the parties", should be retained. The phrase might perhaps be extended with a reference to positive law, i.e., a stipulation that the provision must be permitted by the applicable rules, since there might be cases in which the rules of the bar association or a similar organization would preclude the action envisaged. In any event, the opening phrase "unless otherwise agreed by the parties" should be retained.

18. His delegation agreed with the delegations of Ecuador, the United States and the United Kingdom that the scope of draft article 13 should be extended to cover not only the contract or any related contract but also any other legal relationship. That was particularly important since the first part of the draft article allowed for the possibility of the parties agreeing to allow the conciliators to continue as arbitrators, as appeared to be the tradition in China.

19. **Mr. Möller** (Observer for Finland) said that the scope of draft article 13 should be limited to the matter of the conciliator acting as an arbitrator and not deal with the question of his acting as a representative. For the sake of clarity, the phrase "unless otherwise agreed by the parties" should be retained. The suggestion made by the United Kingdom, to refer to "the contract or any related contract" might be too narrow. One possibility would be to add, as suggested by the United States, "or legal relationship". It might be better, however, to say "the same contract or any related contract" or "the same legal relationship". He did not have strong feelings on the matter.

20. **Mr. Markus** (Observer for Switzerland) said that the draft article should focus on the arbitrator and not on the representative. With respect to the phrase "unless otherwise agreed by the parties", he noted that there was broad support for leaving it in the text; however, he wished to stress that the reason he felt it should be deleted was that it could give the mistaken impression that there were two different degrees of

party autonomy. The principle of party autonomy was a holistic one; the reader of the text might think that other articles not introduced by the phrase in question were more mandatory than, for instance, article 13. The issue could be resolved by leaving the phrase in draft article 13 but explaining in the Guide what was meant and why it had been retained, namely, only for the reasons explained by the United States delegation.

21. With respect to the United Kingdom proposal, he suggested that the text should refer to closely related disputes instead of contractual relationships and other legal relationships. That wording would cover both the contractual relationship and other closely related legal relationships. In some legal systems, there might also be a relationship between contracts and torts. He therefore suggested that the text should read as follows: "... conciliation proceedings or in respect of another dispute which is closely related to that dispute".

22. **Mr. Marsh** (United Kingdom) said that his delegation was in favour of retaining the phrase "unless otherwise agreed by the parties".

23. **The Chairman** noted that the Working Group had been strongly in favour of retaining the phrase "unless otherwise agreed by the parties". There was also broad support for the United Kingdom proposal to change the ending of draft article 13 to read: "of another dispute that has arisen from the same or a related contract or legal relationship". As requested by the Observer for Switzerland, the Guide would include an explanation of the relationship between draft article 13 and the provisions that included the phrase "unless otherwise agreed by the parties". Reference would also be made to the practice in certain countries, such as China, where a conciliator could also act as arbitrator.

24. **Mr. Zanker** (Observer for Australia) suggested that instead of referring to disputes arising out of the same contract or any related contract or legal relationship, the text might simply refer to a dispute that had arisen out of the same factual circumstances.

25. **Mr. Barsy** (Sudan) said that the phrase "any related contract" was very broad; it would be better to change it to refer to any contract that might be related to conciliation or perhaps a contract already mentioned during conciliation. The phrase "of a dispute that was or is the subject of the conciliation proceedings" was not clear. Did it refer to a dispute between the same parties or between other parties? It would be better to say "in a dispute between the two parties in question".

26. **The Chairman**, referring to the first point raised by the representative of the Sudan, pointed out that there had already been agreement to accept the amendment proposed by the United Kingdom. The second point raised by the Sudan had been considered by the Working Group, which had reached the conclusion that the scope of draft article 13 should cover not just the parties to the dispute but also other parties. The matter had already been discussed at length.

27. *Draft article 13, as amended, was provisionally approved.*

Proposal submitted by China

28. **Mr. Tang** Houzhi (China), drawing attention to original draft article 16 (A/CN.9/506, para. 130), entitled "Arbitrator acting as conciliator", recalled that although there had been no opposition to the content of that paragraph, the Working Group had deleted it and decided that an explanatory note would be included in the Guide. Some delegations had argued that the provision should be included in the law on arbitration rather than in the one on conciliation. China did not agree with that position because at least four articles in the draft model law on conciliation mentioned arbitration; therefore, it could not be argued that arbitration was irrelevant.

29. In addition to China, there were some 20 or 30 countries whose domestic law and practices allowed arbitrators to act as conciliators in the process of arbitration, including Oriental as well as Western countries. The World Intellectual Property Organization (WIPO) and the Society of Maritime Arbitrators also allowed for such a possibility. There were many other countries which did not allow arbitrators to act as conciliators. Deleting the original draft article 16 (A/CN.9/506, para. 130) would not be conducive to the development and improvement of the law in those 20-plus countries, including China. His delegation suggested that instead of treating the original article 16 as a formal article, it should be included as an optional article. It would thus be placed in a footnote as article Y.

The meeting was suspended at 4.30 p.m. and resumed at 5.10 p.m.

30. **Mr. Milassin** (Hungary) said that his delegation was willing to support the Chinese proposal to reintroduce former draft article 16 as a footnote to the

present draft article 13, even though it dealt with an arbitration situation. In Hungary, as it happened, the national rules governing conciliation fell within the rules of procedure of arbitral courts. Hungarians had little experience with conciliation but foresaw that it would be useful in the future.

31. **Mr. Joko Smart** (Sierra Leone) said that initially his delegation had thought that a model law on conciliation was not the place to deal with the competence of a conciliator to act as an arbitrator. However, in view of the trend towards encouraging conciliation in the context of arbitration, his delegation would support the Chinese proposal.

32. **Ms. Moosa** (Singapore) said that her delegation supported the Chinese proposal because it was consistent with her country's legal framework on arbitration. The inclusion of the text of former draft article 16 would be a useful compromise.

33. **Mr. Miki** (Japan) said that in earlier discussions his delegation had thought that the proper place for former draft article 16 was in a law on arbitration, not on conciliation, but it had no problems with the provision's inclusion in a footnote. It would seem more appropriate, however, to place it in a footnote to article 1, paragraph 8 (a), which referred to the same situation, where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempted to facilitate a settlement.

34. **Ms. Göth-Flemmich** (Austria) said that her delegation had sympathy for the Chinese position but did not see how draft article 13 and former draft article 16 could appear in the same text, even with the latter in a footnote, since they were contradictory. Perhaps a better solution would be to eliminate draft article 13. Countries that had adopted the UNCITRAL Model Law on International Commercial Arbitration would have no need for it; any party who did not wish to accept a former conciliator as an arbitrator could challenge the appointment.

35. **The Chairman** said that the two draft articles had been exhaustively debated in the Working Group, and there had been broad agreement that draft article 13 should be in the text.

36. **Ms. Chadha** (India) said that her delegation supported the Chinese proposal because it suggested another mode in which an arbitrator might sponsor conciliation and was not inappropriate.

37. **Mr. Holtzmann** (United States of America) said that his delegation regretted that it must demur when so many delegations had spoken in support of the Chinese proposal. Former draft article 16 had been extensively discussed at both the thirty-fourth and thirty-fifth sessions of the Working Group on Arbitration and rejected as being out of place in a model law on conciliation. His delegation was concerned about having it included even in a footnote, because it could create traps for the unwary. Those countries that might consider incorporating it in their national legislation on conciliation should be aware of the potential hazards their nationals might encounter in other jurisdictions where the principle ran counter to national laws and codes of ethics. For example, the International Bar Association's Rules of Ethics for International Arbitration provided that if an arbitrator acted as a conciliator, the normal result would be that the arbitrator would become disqualified from any future participation in the arbitration. Such discrepancies might have the effect of discouraging international conciliation. His delegation felt that if the provision was to be left in at all, it should only be in the Guide to Enactment, accompanied by the appropriate caveats.

38. **Mr. Graham** (Mexico) said that Mexican law had nothing to say about arbitrators acting as conciliators or vice versa. The wording of what was now draft article 13 had evolved over time towards a more liberal interpretation. The rule that a conciliator should not later be an arbitrator in the same matter was not mandatory. The opening phrase, "unless otherwise agreed by the parties", ensured that the option considered desirable by some other delegations was not excluded. However, the inclusion of text in a footnote setting forth a rule that dealt with the area of arbitration could create confusion.

39. **Mr. Heger** (Germany) said the representative of Japan was correct in linking former draft article 16 with article 1, paragraph 8 (a); the two provisions were indeed about the same topic, but on examination they were contradictory. Draft article 1, paragraph 8 (a), stated that the Model Law did not apply to cases where an arbitrator attempted to facilitate a settlement, whereas former draft article 16 sought to formulate a rule for just such a situation.

40. Draft article 13 and former draft article 16 seemed to be contradictory in principle, even though they dealt with somewhat different situations. In draft article 13, the conciliator was barred from acting as an

arbitrator in the same matter subsequent to failed conciliation proceedings, whereas former draft article 16 postulated the situation in China and some other countries where it was normal for an arbitrator, in the midst of arbitration proceedings, to act as a conciliator. However, as Mexico had pointed out, the rule in draft article 13 left room for flexibility, since it was preceded by the phrase, "unless otherwise agreed by the parties".

41. **Mr. Lebedev** (Russian Federation) emphasized the complexity of the problems raised by the Chinese proposal. The previous draft article 16 had been deleted from the text of the Model Law following discussion, at two previous sessions of the Commission, of the difficulties it would cause. However, a large number of countries appeared to have a provision of that kind in their existing law, so there was no objection in principle to States incorporating such a provision when adopting the Model Law. The main problem now was to find a compromise formula to reflect the provision in the text of the Model Law. To ignore it altogether would be the easy way out, but would not square with the Commission's endeavours to find solutions acceptable to a majority of States. Like the United States delegation, he would prefer to place it in the Guide to Enactment. That would perhaps satisfy the interests of China and other countries in having the Commission adopt a text which reflected their own practice and which they could in future incorporate in their own law. It would not affect countries, such as his own and India, whose arbitration law prohibited the practice of combining conciliation with arbitration.

42. **Mr. Jacquet** (France) acknowledged that the legal systems of a number of countries, in addition to China, admitted the practice of combining conciliation with arbitration. He was therefore sympathetic to the Chinese proposal, and felt the Commission should strive for a synthesis which reflected as many trends as possible. However, the technique of including footnotes or optional articles was undesirable and should not be followed in the present instance, because it would detract from the meaning and force of the Model Law. It was already clear that the minimalist approach of including in the Guide to Enactment a comment on the practice of combining arbitration and conciliation would be widely acceptable, but not to China. The only other alternative would be a footnote to draft article 1. However, the former draft article 16 could not be reincorporated in that guise, because it was a statement of a rule. Any footnote must be purely descriptive, indicating merely that some countries admitted the practice of combining arbitration and conciliation.

43. **Mr. Markus** (Observer for Switzerland) said he was reluctant to endorse the proposal to have the former draft article 16 included as a footnote either to article 1, paragraph (8), or to article 6, since that could cause problems for the scope of application of the Model Law. According to draft article 1, paragraph (8), the Model Law did not apply to cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempted to facilitate a settlement. That exclusion had been decided upon by the Working Group because, in such cases, the rules in the Model Law would be inappropriate. It did not however mean that conduct of that kind by an arbitrator would be prohibited. Local arbitration rules, or those of the International Bar Association, might prevent an arbitrator from acting as a conciliator, but the Model Law itself was completely neutral on the question. It would therefore be highly problematic to place the former draft article 16 in a footnote. To do so might also create a conflict with draft article 13. Moreover, the former draft article 16 was about arbitration, not conciliation, and did not belong in the Model Law. He therefore agreed with the United States representative that it would be best to deal with the problem in the context of the Guide to Enactment.

44. **Mr. Zanker** (Observer for Australia) said he agreed with the remarks by the representative of the United States and the Observer for Switzerland. He did not support the Chinese proposal.

45. **Mr. Correia** (Observer for Portugal) said he sympathized with the position of the Chinese delegation, but of two possible scenarios — a conciliator being prohibited to act subsequently as an arbitrator, and an arbitrator acting as a conciliator having already begun an arbitration procedure — the Model Law was concerned only with the first. When the former draft article 16 was under discussion, it had been decided not to include it in the Model Law for the very reason that it dealt with arbitration proceedings. He therefore endorsed the views of the representative of France and the Observer for Switzerland. Draft article 13 should be left as it was. He could however agree to the inclusion in the Guide to Enactment of a note explaining the practice of combining arbitration

and conciliation, in the context of article 1, paragraph (8).

46. **Mr. Reyes** (Colombia) said that in view of the rule in draft article 1, paragraph (8), a footnote along the lines proposed by China would prove confusing. For the sake of meeting the concerns of that delegation, he could support the proposal to clarify the problem in the Guide to Enactment, including a reference to draft article 1.

47. **Mr. Cosman** (Canada) said there appeared to be a mistaken notion that his jurisdiction admitted the practice of combining mediation with arbitration; it did not. Nor did he support the notion of reviving the former draft article 16 in the form of a footnote.

48. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said draft article 13 was a statement of a standard rule prohibiting the combination of two contradictory practices. He was attracted by the compromise solution suggested by the representative of France. A footnote could perhaps be included to draft article 13, merely stating as a fact that some countries did admit the practice. The title of draft article 13 should be reviewed by the drafting group. "Conciliator acting as arbitrator" seemed an unsuitable wording, given that the purpose of the article was to prohibit conciliators from doing so.

49. **The Chairman** said the title would be reviewed by the drafting group.

50. **Mr. Marsh** (United Kingdom) said he agreed with the remarks by the United States representative, noting that they had been supported by other delegations. If a reference to the problem was included in the Guide to Enactment, the best place for it would be in the commentary to article 13, rather than the commentary to article 1. Article 1 dealt with the scope of application of the Model Law, not with matters of practice or what conciliators and arbitrators could and could not do.

51. **Mr. Barsy** (Sudan) said he could not support the Chinese proposal. The former draft article 16 ran directly counter to the provision in draft article 1, paragraph (8).

52. **Mr. Tang** Houzhi (China) said he understood that the Commission had to take a neutral position on the question and was anxious to promote the development of international conciliation in commercial matters. However, to the best of his recollection, when the Working Group was discussing draft article 16 no objections had been raised to its content. The decision to leave it out of the Model Law had been made because the role of arbitrators was not supposed to be dealt with in the text. However, at least four of the draft articles did mention arbitrators, so there seemed to be no valid reason why they should not be mentioned as in the former article 16. To his knowledge, over 20 countries had an interest in the relationship between arbitration and conciliation. The two practices went hand in hand, and should both be taken into consideration in the Model Law.

53. **The Chairman** said the matter had been thoroughly discussed in the Working Group, which had offered, as a compromise, to include in the Guide to Enactment a statement explaining that some countries allowed the roles of conciliator and arbitrator to be combined. It was not the Commission's policy to prohibit that practice.

The meeting rose at 6 p.m.

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Thirty-fifth session

Summary record of the 745th meeting
Held at Headquarters, New York, on Thursday, 20 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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02-43429 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.15 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Article 10. Duty of confidentiality (continued)

1. **The Chairman** invited the Commission to resume consideration of article 10, which had been left pending.

2. **Mr. Kovar** (United States of America) said that the title, "Duty of confidentiality", implied liability if confidentiality were breached, particularly when coupled with the very general definition of conciliation provided under article 1, paragraph (2). His delegation thus wished to propose a compromise solution that would reconcile his delegation's own concerns in respect of domestic implementation under common law with the Commission's desire to maintain strong confidentiality language. The words "Duty of" would be deleted, reflecting the title of article 14 of the UNCITRAL Conciliation Rules, and the following paragraph would be inserted in the Draft Guide to Enactment (A/CN.9/514):

> "It is the intent of the drafters that in the event a court or other tribunal is considering an allegation that a person did not comply with article 10, it should include in its consideration any evidence of conduct of the parties that shows whether they had, or did not have, an understanding that a conciliation existed and consequently an expectation of confidentiality. A State that enacts the Model Law may wish to clarify article 10 to reflect this interpretation."

3. **The Chairman**, urging the Commission to consider the proposal in a spirit of flexibility, said that it was traditional practice for it to seek imaginative solutions when a State expressed grave concern as to the acceptability of a provision within its national law.

4. **Mr. Marsh** (United Kingdom), after expressing overall support for the modifications proposed by the United States representative, said that he would be in favour of deletion of the final sentence, which appeared to suggest that the Model Law as drafted did not clearly reflect the intention of the drafters.

5. **Mr. Lebedev** (Russian Federation) said that his delegation was ready to accept the proposed change to the title, on the understanding that the conciliator and the parties were obliged to keep the conciliation proceedings confidential. It was indeed important to ensure that the result of the Commission's work was acceptable to a variety of legal systems, which was why he supported the text proposed for inclusion in the draft Guide. It was also important to retain the final sentence of that text, which merely indicated to enacting States that the matter might require further clarification.

6. **Mr. Möller** (Observer for Finland), said that his delegation fully supported the proposed modifications and favoured retention of the final sentence, which could serve a useful purpose for certain States.

7. **Mr. Morán Bovio** (Spain), joining with the previous two speakers, said that his delegation unreservedly supported the United States proposal. The sentence in question should be retained for inclusion in the Guide, since it clarified the lack of unanimity on the issue within the Commission and alerted States to importance of dealing carefully with the precept.

8. **Mr. García Feraud** (Observer for Ecuador) said that he supported the change in title, but was concerned that the proposed paragraph, as currently worded, might go beyond the proper purview of a model law. Since it was clearly aimed at arbitrators or judges who might be called upon to consider an act of breaking the obligation of confidentiality, it concerned procedures governed by other normative systems.

9. **Ms. Moosa** (Singapore) said that she had no objection in principle to the proposal. The proposed text befitted the Guide, its intention being to draw the attention of States to the possible ramifications of the provision.

10. **Mr. Shimizu** (Japan) said that although his delegation had no objection to the proposal and welcomed the accommodating spirit in which it had been made, further clarification would be appreciated. Since the problem raised by the United States representative was evidently related to the broad definition of conciliation under article 1, the proposed text could be said to be applicable whenever there was a question of whether conciliation had taken place.

11. **Ms. Renfors** (Sweden) welcomed the fact that the text was being proposed for inclusion in the Guide, not the Model Law itself. In the hope of accommodating the concerns expressed by the representative of the United Kingdom and the Observer for Finland, her delegation wished to propose a modification of the final sentence as follows: "When enacting the Model Law, certain States may wish to clarify article 10 to reflect this interpretation."

12. **Mr. Kovar** (United States of America) said that he had no objection to the modification proposed by the previous speaker. With regard to the question raised by the representative of Japan, his delegation had in fact suggested in connection with article 1, paragraph (2), that the Guide should include a reference to clarifying the circumstances in which a conciliation would be deemed to have existed. It felt particularly strongly that the point should be re-emphasized in respect of article 10.

13. **Ms. Brelier** (France) proposed that the title of article 10 should read "Confidentiality of conciliation".

14. **The Chairman** said he took it that there was no objection to the revision of the title of article 10 as proposed by the United States representative and modified by the representative of France and that the Commission also agreed to include the text proposed by the United States representative in the draft Guide, as modified by the representative of Sweden. In the same article, the words "Unless otherwise" would be retained since there had been an objection to their deletion.

15. *It was so decided.*

Draft article 14. Resort to arbitral or judicial proceedings

16. **Mr. Graham** (Mexico), referring to paragraph (2), proposed that the words "in its sole discretion" should be deleted to ensure that the initiation of arbitral or judicial proceedings was governed by objective criteria alone and that the protection provided in paragraph (1) was not rendered ineffective.

17. **Mr. Kovar** (United States of America) said that it was unclear whether the party must comply with the court order. Revision of the standard contained in article 16 of the UNCITRAL Conciliation Rules had inadvertently given rise to ambiguity by creating such a strong juxtaposition between the rights of the parties on the one hand, and, on the other hand, the role of the court or tribunal in enforcing the terms of an agreement to conciliate. The conflict between the two paragraphs would be eliminated if they were joined into one paragraph and the words "A party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary" were replaced with the following formulation: "except to the extent necessary for a party, in its opinion". Such a modification might also address the concern raised by the previous speaker.

18. **Mr. Jacquet** (France) asked whether the first sentence of paragraph (2) could be understood as targeting juridical proceedings on the basis of a provisional or protective measure.

19. Alongside the rule that conciliators could not be arbitrators and the rule that conciliation must be confidential, the article under consideration embodied one of the most important principles at stake in the Model Law, namely that conciliation was incompatible with arbitral or judicial proceedings. It was regrettable that the rule was thus being presented in a truncated version. The original version (A/CN.9/506, para. 124) had contained an additional first paragraph to elucidate the general principle, but that paragraph had been deleted on the spurious grounds that it was "too broadly stated". Since the article could not be fully understood without the deleted text, his delegation was in favour of reinstatement of the original first sentence, namely: "During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation."

20. As the article currently stood, no response was provided to the question of what was to be decided when parties had agreed to conciliate but had *not* expressly undertaken not to initiate arbitral or judicial proceedings during a specified period of time. Judges — to whom article 14 was surely also addressed — would currently not find a response to the question of whether to declare themselves competent when a party in a conciliation turned to the courts. That question could not be left wholly unanswered in the Model Law. The original first sentence had provided the principle required by States in order to determine to what extent the conciliation should be recognized and turned over to domestic jurisdiction. Without that sentence, the provision risked being used in a curiously

regressive manner that would be contrary to the UNCITRAL Conciliation Rules and to most of the conciliation rules in force in the world.

21. **Mr. Sekolec** (Secretary of the Commission), responding to the question of the delegation of France, said that the philosophy of the earlier draft had been to have the Model Law recognize an agreement (if such an agreement existed) between the parties in conciliation not to initiate arbitral or judicial proceedings. In that respect, the Model Law did not seek to protect the parties from themselves. Once the parties had actually embarked on conciliation, the circumstances under which arbitral or judicial proceedings could be initiated were different.

22. **Mr. Lebedev** (Russian Federation), referring to the United States proposal to merge paragraphs (1) and (2) of draft article 14, asked whether the changes to the wording of that provision would include deleting the last sentence of paragraph (2), as that would mean that after agreeing not to start arbitral or judicial proceedings, any party initiating such proceedings could be deemed not to have ended its agreement to engage in conciliation or to have terminated the conciliation proceedings.

23. **Mr. Sillapamahabundit** (Thailand) said that the phrase "until the terms of the undertaking have been complied with" in the last sentence of draft article 14, paragraph (1), worried his delegation, as it appeared to be tantamount to suspending the jurisdiction of a court. That agreement was an agreement between the parties to the conciliation proceedings, and was an obligation on them, not on a court or arbitral tribunal. He favoured the wording used in article 16 of the UNCITRAL Conciliation Rules.

24. **Mr. Morán Bovio** (Spain) said that three separate issues had been raised in connection with draft article 14. First was the concern of the representative of Mexico to make paragraph (2) less subjective by removing the phrase "in its sole discretion", a proposal which his delegation felt uncomfortable with because of the difficulty of achieving complete objectivity. Second was the suggestion of the United States delegation to merge paragraphs (1) and (2), which he had not fully understood and called for a further explanation of. Third was the proposal of the French delegation to return to a text which the Working Group had since changed, on which he saw little need for action on the grounds that other similar agreements posed no problems. He urged those issues to be considered separately to avoid neglecting any of them.

25. **Mr. Kovar** (United States of America) agreed with the previous speaker that the three issues should be dealt with separately. With regard to the first issue, raised by the delegation of Mexico, he said that he agreed with the representative of Spain that complete objectivity would be impossible to achieve. With regard to the second issue, his own delegation's proposal, he responded to the question from the delegation of the Russian Federation by pointing out that the intention was not to change the substance of the existing text, but merely to reduce what seemed according to that text to be a conflict between the obligation of a court or arbitral tribunal to enforce any undertaking by the parties not to take arbitral or judicial action, and the right of a party to take arbitral or judicial action to preserve its rights. In his view, having separate paragraphs (1) and (2) reinforced that perceived conflict, while merging them reduced it. The last sentence of paragraph (2) was unaffected by the proposed amendment.

26. With regard to the third issue, raised by the delegation of France, he said that the Working Group had thoroughly discussed the wording covering resort to arbitral or judicial proceedings and had seen no reason to include a separate obligation on the parties not to start judicial or arbitral action if they had not specifically agreed to refrain from doing so in advance.

27. **Mr. Heger** (Germany) said that the French proposal had surprised him in the light of the discussion of the Chinese proposal regarding the reinstatement of article 16 of the draft Model Law (A/CN.9/SR.744), where it had been regularly argued that the draft Model Law was regulating conciliation rather than arbitration or court action. In spite of that assertion, draft article 14 seemed to be targeting exactly that sphere.

28. **Mr. Talpis** (North American Free Trade Agreement Article 2022 Advisory Committee), referring to the French proposal, pointed out that parties were unlikely to elect to use conciliation in an international dispute unless there was a legal framework for such conciliation which excluded competing procedures, wherever the latter might take place. That was a provision commonly found in arbitration agreements. Draft article 14, paragraph (1), seemed to ensure the enforcement of the agreement to

engage in conciliation, but perhaps did not go far enough in doing so, as enforcement depended upon the parties having agreed not to initiate judicial or arbitral proceedings for a certain period or until after a particular event had taken place. To guarantee enforceability, parties would have to bear in mind the need for such an express condition, and agree on its content.

29. In practice, however, agreements to enter into conciliation were not always negotiated by lawyers and did not always contain such conditions. As a result, draft article 14 appeared to leave the fate of those agreements' intent in the hands of national laws: they might be enforceable in one country, but not in another. He asked the Commission to consider adding to draft article 14, paragraph (1), or to the Guide, wording to the effect that even without such conditions, judicial or arbitral authorities' proceedings would be stayed until after a good-faith attempt at settlement had been made.

30. **Mr. Graham** (Mexico) said he wished to clarify the reason for his delegation's suggestion that the phrase "in its sole discretion" should be removed from draft article 14, paragraph (2). Doing so would provide an interval during which judicial or arbitral proceedings could not be started. That was significant in view of the fact that in some jurisdictions, Mexico included, judicial proceedings were difficult to initiate, because they required the case to be thoroughly prepared. The risk was that a party contemplating such proceedings would spend time preparing them, rather than giving conciliation a chance to work. Removing the reference to "sole discretion" would emphasize that good reasons had to exist to initiate such proceedings.

31. **Mr. Markus** (Observer for Switzerland) said he had several comments deriving from the question of the French delegation. First, in his view, paragraph (2) allowed a party which thought it needed to preserve its own rights to initiate interim measures of protection or any other proceeding short of full court proceedings. In fact, in many legal systems, such interim measures were expected to lead on to actual court proceedings within a particular period of time, failing which the interim measures would lapse.

32. Second, he favoured retaining some degree of subjectivity in the right to initiate judicial or arbitral proceedings, and therefore supported the proposal of the United States delegation to specify that a party's decision to do so would reflect its own assessment of the situation (through the phrase "in its opinion").

33. Third, his desire to retain some subjectivity in a party's decision to begin judicial or arbitral proceedings stemmed from the possibility that one party in a conciliation proceeding might halt progress simply by remaining passive, leaving the other party with no alternative but to launch such proceedings. He proposed that that eventuality be added to the list of circumstances in paragraph 76 of the draft Guide that might require arbitral or judicial proceedings to be started.

34. Fourth, with regard to the French proposal to block arbitral or judicial proceedings even when the parties had made no express agreement to refrain from them, he thought that such a far-reaching step was risky, because it had implications that might even affect constitutional rights in countries where such rights included entitlement to access to the courts.

35. **The Chairman** said that a number of issues had been raised, but no clear opinion was emerging. He proposed to suspend the meeting for consultations.

The meeting was suspended at 11.35 a.m. and resumed at 12.15 p.m.

36. **Mr. Möller** (Observer for Finland) said he had several comments on draft article 14. First, regarding the remarks of the German delegation that the article was out of place in a Model Law that dealt with conciliation, he disagreed: the provision was in fact necessary. Second, with regard to the comments by the delegation of France, he considered the reference to an express undertaking not to initiate arbitral or judicial proceedings in paragraph (1) to be necessary, as the Working Group had decided. Third, regarding the drafting change proposed by the United States delegation, he thought that it introduced a clear improvement. Adding the phrase "in its opinion" reflected the wording of article 16 of the UNCITRAL Conciliation Rules. Fourth, with regard to the risk referred to by the Observer for Switzerland that one party might stall the conciliation proceedings by remaining passive, forcing the other party to take arbitral or judicial action, he said that the solution lay in draft article 12; the undertaking not to start judicial or arbitral proceedings was closely interlinked with the agreement to engage in conciliation.

37. **Mr. Sekolec** (Secretary of the Commission) said that he did not want to interrupt the discussion under way, but that the secretariat had received a question regarding the draft Model Law from the construction industry, where clauses in contracts often provided that for a predetermined period after a dispute arose, the parties would attempt to resolve that dispute with an engineer. During that proscription period, the parties would not take judicial action except to apply for interim measures of protection. The industry had asked whether draft article 14 in its current form invalidated such clauses. The secretariat had replied that it did.

38. **Mr. Holtzmann** (United States of America) said that, while the secretariat's response to the construction industry had been correct, such a contract would constitute a variation of the law under article 3. As for draft article 14, paragraph (2), his delegation preferred the phrase "in its opinion" to "in its sole discretion"; in any case, some such phrase was necessary for the practical reason that a Court's determination as to whether it was necessary for a party in conciliation to bring a lawsuit near the end of the limitation period could be both time-consuming and unpredictable. In order to forestall abandonment by that party and ensure the continuation of the conciliation proceedings, the parties' rights must be preserved. The wording proposed by his delegation did not change the substance of the Working Group's draft, and he was pleased that delegations considered it an improvement.

39. While the French proposal was interesting, his delegation, regretfully, could not support it. His delegation believed that, ultimately, party autonomy, was the best policy: both parties must be fully cognizant of what they were undertaking and there must be no "traps for the unwary" in any portion of the text. That could best be achieved through an agreement.

40. **Ms. Renfors** (Sweden) said she supported the principle of party autonomy but felt that the broadly formulated text of draft article 14 at once upheld and impeded it by giving the parties latitude to deviate from the agreement and institute judicial proceedings. Perhaps a clarification in the draft Guide to Enactment would be sufficient to resolve the contradiction. Her delegation preferred the phrase "in its opinion" precisely because it allowed less room for deviation.

41. She also wondered how article 14 was supposed to operate in relation to article 3. Since article 14 was not mentioned in article 3, the parties could agree that article 14 should not apply. Some clarification was needed.

42. **Mr. García Feraud** (Observer for Ecuador) expressed full support for the Mexican proposal. While parties in the conciliation should be able to preserve their rights, any language that was discretionary or subjective, or which relaxed the parties' obligation to abide strictly by the law, should be deleted in order to maintain objectivity. Hence, the first sentence of paragraph (2) should read: "A party may nevertheless initiate arbitral or judicial proceedings where such proceedings are necessary to preserve its rights."

43. In the interest of ensuring the continuation of the conciliation proceedings, the emphasis should be less on the parties' right to abandon such proceedings through an express declaration than on restricting their latitude to initiate arbitral or judicial proceedings. He recalled the Commission's decision not to incorporate article X on suspension of limitation period as a feature of the draft Model Law but rather to relegate it to a footnote, and its judgement that the need for such a suspension must be clearly demonstrated. In that context, the Mexican proposal became extremely relevant.

44. The representative of Sweden had a sound basis for questioning the relationship between article 14 and article 3. He believed that article 14 should be mentioned in article 3.

45. **Mr. Marsh** (United Kingdom) expressed strong support for the inclusion of subjective language, in the draft article and endorsed the United States formulation "in its opinion". It had to be assumed that the term "necessary [to preserve its rights]" applied to both matters of law and commercial judgement, and the latter could only be exercised subjectively. His delegation very much hoped that one effect of the Model Law would be to encourage businesspeople not only to engage in conciliation but also to include conciliation clauses in contracts. However, if the impact of doing so would mean sacrificing their decision-making power over what was commercially necessary, that would act as a disincentive.

46. **Mr. Tang** Houzhi (China) said that the paragraph as currently drafted should remain intact; it was very comprehensive and reflected a wide range of views. He saw no major difference between "in its sole discretion" and "in its opinion", except, perhaps, that

the former afforded the parties slightly more latitude. If necessary, either of those phrases could be deleted, since the criteria for recourse to arbitral or judicial proceedings were very complex and a determination could not be made subjectively. However, he believed that a decision by the parties themselves as to the appropriateness of instituting arbitral or judicial proceedings to preserve their rights was not necessarily a violation of the conciliation agreement, and that, in initiating such proceedings, they were not necessarily waiving the conciliation agreement or terminating the conciliation proceedings.

47. **Mr. Cosman** (Canada) said that his delegation supported the United States amendment to draft article 14, which provided useful clarifying language while maintaining the substance of the original text.

48. **Mr. Barsy** (Sudan) said that his delegation supported the formulation "in its sole discretion", although it had no strong objection to "in its opinion" and saw the value of both expressions. He wondered what the United States position would be if arbitral or judicial proceedings were not necessary to preserve a party's rights and the other party could adduce evidence to that effect. If a court or arbitral tribunal applied paragraph (1) of draft article 14, the conciliation agreement would not be implemented and the party that had initiated the proceedings would bear the consequences. He also wished to ascertain whether arbitral or judicial proceedings would continue simultaneously with the conciliation proceedings once a party's rights had been preserved since, in his delegation's view, they would be necessary in view of their relation to the conciliation agreement.

49. **The Chairman** noted the general support for the Working Group's draft, with the amendment proposed by the United States, which did not alter the substance of the Working Group proposal but rather clarified it. He said that the relationship between articles 3 and 14 could be considered when the Commission reviewed the entire text of the draft Model Law. Concerns regarding the relationship between the Model Law and the conciliation laws of individual states could be addressed in the draft Guide to Enactment.

50. **Mr. Jacquet** (France) said that, if there were no longer any obstacles to instituting arbitral or court proceedings — save express agreement by the parties — all the subtlety of paragraph (2) would be for naught. That would create a substantive problem that would be extremely damaging to the draft Model Law and would not resolve most of the practical difficulties that could arise. The only substantive argument he had heard against his delegation's original proposal was the need for party autonomy highlighted by the United States delegation and the possibility that the parties in the conciliation could fall into a trap. Ironically, the greatest trap was the article itself, as currently drafted, which led the parties to believe that they were protected from court proceedings when they actually were not.

51. His delegation, too, supported party autonomy; however, it had to be applied properly and only in very specific circumstances. He failed to understand how, in the name of "party autonomy", the Commission could forgo a sound rule that could be tempered, if necessary if necessary, by party autonomy, and leave the parties without any protection against arbitral or judicial proceedings. His delegation would like to see a reference to party autonomy included in the title of the article, which would then be tempered by paragraph (1) as currently drafted, the parties' option to end the conciliation proceedings, and paragraph (2), regardless of its final formulation.

52. **The Chairman** said that consideration would be given to the French proposal if time allowed and that, if not, the views of the representative of France would be reflected in the report of the Commission.

The meeting rose at 1.05 p.m.

United Nations A/CN.9/SR.746

General Assembly

Distr.: General
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United Nations Commission on International Trade Law

Thirty-fifth session

Summary record of the 746th meeting
Held at Headquarters, New York, on Thursday, 20 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

This record is subject to correction.

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

02-43435 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.3)

Draft article 15. Enforceability of settlement agreement

1. **The Chairman** said the question of the enforceability of settlement agreements had been discussed in some detail at the previous session of the Commission, and the present wording represented the maximum degree of consensus which could be achieved at that time. An exchange of views had taken place by electronic mail in the meantime, but it had been inconclusive.

2. **Mr. Sekolec** (Secretary of the Commission) said the nature of the settlement agreement had been left open-ended. As presently drafted, the text of draft article 15 did not make clear that such agreements were enforceable as contracts, although there was broad agreement in the Commission that they were. Some members had queried the meaning of "binding and enforceable", and there was a notion that those words implied the force of a judicial decision. It would be appropriate to provide some clarification, at least in the draft Guide to Enactment.

3. **Mr. Jacquet** (France), referring to the written observations submitted by his delegation, suggested deleting the words "and enforceable". If that was done, the enforceability of the agreement, in a judicial sense, would depend on the local law. He suggested the wording: "The enforceability of the agreement will depend on the law applied by the competent authority of the State where the agreement is invoked".

4. **Mr. Sekolec** (Secretary of the Commission) said that would be the law of the enacting State. Because the Model Law was not a treaty, it could not establish a regime outside the country which adopted it.

5. **Mr. Jacquet** (France) agreed to the phrase "the law of the enacting State", which was a standard formula in model laws adopted by the Commission.

6. *Draft article 15 was provisionally approved.*

Draft article 3. Variation by agreement (*continued*)

7. **The Chairman** said it was necessary to revert to draft article 3 in order to determine which articles of the Model Law, in addition to articles 2 and 7, paragraph (3), were not subject to variation by agreement between the parties. It had already been suggested, by the representative of Sweden, that draft article 14 should be included in the scope of draft article 3.

8. **Mr. Möller** (Observer for Finland) said he was not in favour of including a reference to draft article 14. Even if the parties had expressly undertaken not to resort to arbitral or judicial proceedings for a specified period of time, they should be allowed to make alternative arrangements.

9. **Ms. Renfors** (Sweden) said she was not insisting on a reference to draft article 14 in draft article 3. However, some action must be taken to resolve the uncertainty surrounding the relationship between the two articles. As matters stood, the effect of the amendment to draft article 14 would be that parties to a conciliation who had agreed they would not be allowed to have recourse to arbitral or judicial proceedings could nevertheless go to court to preserve their rights.

10. **The Chairman** said the inconsistency could be removed by including in the agreement a clause to waive the provision in draft article 14 which enabled a party to have recourse to the courts.

11. **Mr. Markus** (Observer for Switzerland) said he agreed with the representative of Sweden that draft article 14 would have a strange effect if it were non-mandatory. It would be saying that effect must be given to an agreement by the parties not to go to court until a certain period had elapsed, but would at the same time be limiting that effect for the sake of preserving a party's rights. If the intention was to limit the effect of article 14 in that way, the rule in it must be a mandatory one. The Model Law was a mixture of contractual and procedural provisions, but most of its rules were contractual, and rules of that kind were always subject to party autonomy. Draft article 14 was one of the few procedural rules in the Model Law, because by defining the limit to be set it was telling the courts whether an action by one of the parties should be admitted. Draft article 14 should therefore be mandatory.

12. **The Chairman** raised the question whether draft article 11, on the admissibility of evidence in other proceedings, should also become mandatory.

13. **Mr. Jacquet** (France) was not in favour of including in draft article 3 a reference to draft article 14. Logically speaking, draft article 14 was an optional clause. It empowered the parties to have recourse to arbitral or judicial proceedings if they so chose. To attempt to make it mandatory would be a grave mistake.

14. **Mr. Graham** (Mexico) said he too opposed the idea of including in draft article 3 a reference to draft article 14, but for a different reason. It would be inconsistent to seek to attribute binding effect to a rule which could only take effect by virtue of an agreement between the parties.

15. **Mr. Heger** (Germany) said he believed it would be a good idea to include in draft article 3 a reference to draft article 14. The situation was one in which parties were to be protected from the consequences of their own errors. In that sense, the possibility of recourse to judicial proceedings was a matter of principle that had more to do with constitutional law than with procedural law. He was far from sure that, from a logical point of view, there were no circumstances in which it would be unnecessary for draft article 14 to be mandatory.

16. **Mr. Morán Bovio** (Spain) said he did not agree that article 14 should be mentioned in draft article 3. The free will of the parties should be paramount. Given that draft article 14 only entered into force by agreement of the parties, and was therefore derogable by its very nature, it made no sense to make it non-derogable by virtue of draft article 3. Article 14 did not belong in the same category as article 2 and article 7, paragraph (3).

17. **Mr. Marsh** (United Kingdom) said that, in his understanding, draft article 14 was intended to ensure that whenever parties made a commitment to use conciliation, they could not, to the extent provided for, renege on that commitment. While that objective was laudable, reference to article 14 in draft article 3 would mean that even when both parties no longer decided that conciliation was appropriate, they would be forced to continue with it nevertheless. That would be a strange and unfortunate provision.

18. **Mr. Holtzmann** (United States of America) said that parties making an agreement under the provisions of draft article 14 ought to be permitted to change that agreement. It should be recalled that in a conciliation procedure, any party was entitled to stop conciliating at any given moment. By removing the freedom of parties to change an agreement, the inclusion of article 14 in draft article 3 would simply result in more parties pulling out of conciliation altogether. He urged strongly for article 14 not to be referred to in draft article 3.

19. **Mr. Barsy** (Sudan) said that his delegation could not agree to a reference to article 14 in draft article 3. Parties should be free to change their minds about the usefulness of arbitral or judicial proceedings, with a view to facilitating the swift resolution of disputes.

20. **Mr. Sekolec** (Secretary of the Commission) asked delegates to consider a situation in which a party, having agreed not to resort to arbitral or judicial proceedings during a conciliation period of 60 days, decided to alter that position before the end of the agreement period. According to the second part of draft article 14, that party would still be entitled to go to court to preserve its rights. Yet, by virtue of draft article 3, parties might have agreed for that right to be removed, and such an agreement would have to be respected. In that case, it would be unclear which provisions prevailed: those in draft article 14, or those in draft article 3.

21. **The Chairman**, speaking in his personal capacity, said that one interpretation was that parties agreeing to a period of 60 days for conciliation were implicitly derogating from the provisions of draft article 12, which established conditions for the termination of conciliation. Another was that by agreeing not to resort to arbitral or judicial proceedings for a period of 60 days, parties were agreeing to a cooling-off period, during which legal action would not be taken, even if conciliation should fail. That provision existed in bilateral investment treaties, for instance, whereby parties agreed to a period of six months without recourse to arbitration.

22. **Mr. Morán Bovio** (Spain) said, in response to the question raised by the Secretary of the Commission, that the general principle underlying the draft Model Law ought to be party autonomy. Despite having committed themselves to a period without arbitration or legal proceedings, parties should be free to alter their

position if they deemed it necessary to defend their interests. For example, one of the parties might fail to demonstrate satisfactory sincerity with regard to the conciliation process, leading the other either to consider or to initiate legal action, while at the same time continuing to conciliate. Parties must be able to protect their rights in such circumstances. It should also be recalled that, owing to the complexity of commercial relationships, the decision by one party to take legal action should not necessarily affect the conciliation process between the remaining parties.

23. **Mr. Markus** (Observer for Switzerland) said that there was an inherent contradiction in failing to make draft article 14 non-derogable. Without including the second part of article 14 under the terms of draft article 3, it would be possible for parties to agree to a cooling-off period of 60 days, and to commit themselves not to go to court even if they deemed it necessary to preserve their respective rights. In his view, it was impossible to allow the restriction of the right to initiate legal proceedings without rendering the second part of draft article 14 meaningless.

24. **Ms. Renfors** (Sweden) said that, in the situation described by the Secretary of the Commission, the provisions of draft article 14 should prevail. Only the second half of draft article 14 should be non-derogable, since clearly the freedom to enter into an agreement could not be made mandatory.

25. **Mr. Heger** (Germany) said that the example given by the Observer for Switzerland showed very clearly the consequences of failing to include draft article 14 under the terms of draft article 3.

26. **Mr. Morán Bovio** (Spain) asked whether a party which, having entered into an agreement not to resort to judicial proceedings during a period of conciliation, subsequently discovered enough about the other party's financial situation to consider that it had a duty to initiate bankruptcy proceedings against that party, should be prevented from doing so by virtue of the initial agreement.

27. **Mr. Shimizu** (Japan) said that if draft article 3 contained no reference to draft article 14, in the situation described by the Secretary of the Commission, the rules contained in draft article 3 concerning the free will of the parties would prevail. The provisions of draft article 14 were intended to fill in the gaps where the intention of the parties remained unclear. It assumed that an agreement in which the parties expressly undertook not to litigate did not exclude the possibility of going to court to protect their rights. The constitutional problem raised by the representative of Germany lay outside the scope of the draft Model Law, and should be resolved within the general framework of the relationship between contractual law and public policy.

28. **The Chairman** said that, unless any objections were raised, draft article 3 would remain as it appeared in the text, without the insertion of a reference to article 14.

29. **Mr. Jacquet** (France) said that it had yet to be decided whether or not article 15 would be referred to in draft article 3.

The meeting was suspended at 4.25 p.m. and resumed at 5.05 p.m.

30. **Mr. Jacquet** (France) said it would be detrimental to the consistency of the Model Law for the agreement reached by the parties following conciliation to be interpreted differently in different countries. Article 15 should be among those articles that could not be changed.

31. **Mr. Tang** Houzhi (China) said he agreed with the French representative that draft article 15 should be mandatory and should be included in draft article 3.

32. **Mr. García Feraud** (Observer for Ecuador) said he agreed that draft article 15 should be included in draft article 3. The conciliation exercise would be weakened if the end result was left up to the will of the parties. Moreover, the Model Law was intended to promote conciliation, and that could best be done by ensuring that the settlement agreement would be enforceable.

33. **Mr. Getty** (United States of America) said that his delegation was opposed to the inclusion of draft article 15 in draft article 3. By its very nature, draft article 15 invited enacting States to specify methods of enforcement. Under the principle of party autonomy, parties might agree that they wished to have enforcement in accordance with the laws of a specific State and not with those of another. Draft article 15 invited a variation based upon a difference in laws. In the United States, for example, the article would probably be considered binding and enforceable as a contract; in other jurisdictions it might be enforceable as a judgement, and in yet others, as an arbitral award. All of those possibilities were valid ways that States

might choose to have enforcement. It would be inherently contradictory to say that draft article 15, which could be varied by individual States, could not be varied by the parties.

34. **The Chairman** said that as he understood it, the French delegation had argued that the parties could not deny the mandatory effect of agreements that were legally valid, while the United States had raised the point that the parties could agree that the enforcement procedure was a matter of choice of forum. In that case, the two positions were not in opposition to each other.

35. **Mr. Markus** (Observer for Switzerland) said that he supported the French proposal with one reservation. The enforceability of a conciliation agreement was based on a State monopoly, inasmuch as it was the State that made the proceedings available. The parties would never be able to agree on enforcement beyond the terms stipulated in the State's procedural laws. For that reason, he supported the French proposal. On the other hand, it should always be possible for the parties to partially or completely give up those elements of enforcement. They might wish to decide that a conciliation agreement would only bind them in certain aspects. It might be worthwhile to mention that possibility in the Guide, in connection with article 3 or article 15. It was important to respect the principle of party autonomy.

36. **Mr. Marsh** (United Kingdom) said that his delegation had considerable reservations about the inclusion of draft article 15 within the articles referred to in draft article 3. The nature of the conciliation process was such as to encourage and enable the parties to reach their own settlement. It followed from that that the parties would put into the settlement whatever it was that they wanted to see in it. One such provision might well be that they did not wish the settlement agreement to be binding. One example might be that of three joint venture partners from different countries who had a disagreement about a matter of strategy or business priority. There was no reason why they should not use a conciliator to help them resolve the matter. In doing so, they would be seeking assistance in reaching a business strategy for the future; they would not be looking to create legally binding obligations. They would not expect to be bound by contractual obligations. He saw no reason why they should not be entitled to use the conciliation process. For pragmatic reasons and so as not to limit the use of conciliation in situations such as that, his delegation was in favour of excluding draft article 15 from the references in draft article 3.

37. **Mr. Jacquet** (France) said that the example just provided by the United Kingdom was inconclusive and did not fall within the scope of draft article 1 of the Model Law. It was not clear why the parties in that example would see a need to have recourse to a decision that would be binding. Their dispute would not be legal in nature, but would simply be an issue of commercial strategy.

38. He did not understand why the United States delegation had remained silent on the French proposal for a new wording of draft article 15. What the representative of the United States had just said was precisely what the French delegation had proposed, namely, that when a conciliation agreement had been reached, the parties were free to choose the country in which they wanted the legal consequences of their conciliation agreement to take effect. The rationale of the conciliation agreement was that the parties ended up with a contract; that was what France had proposed. In fact, France had proposed that in draft article 15 there should be a period after the word "binding"; beyond what was binding, the parties would move on to domestic law. That was the position that had been expressed by the United States representative and thus there was no contradiction between the two positions. There was no strong reason to oppose the inclusion of draft article 15 in draft article 3. It was unfortunate that the situation had not become clear earlier; the problem he saw now was that article 15 was more binding than the United States delegation wanted it to be. If the text was amended to end with the word "binding", then the article could stand on its own. The inclusion of the term "enforceable" created problems because it would have meaning only with respect to national legislation.

39. **Mr. Lebedev** (Russian Federation) said that the issue was a very complex one because currently there was no article 15, but only the introduction to the article. It was his understanding that so far no decision had been taken to amend the three lines of the draft article. According to that text, the States adopting the Model Law would have to establish the conditions and procedures to be followed in implementing the international agreement between the parties. It was very difficult, without knowing what laws the individual States would enact, to take a decision as to

whether the article should be classified under the binding or non-binding rules of the Model Law.

40. Another issue, which might appear to be purely academic but which nevertheless must be considered, was the situation that would arise if the conciliation procedure took place in a particular State in which the Model Law was applicable and the parties agreed that the conciliation agreement should be implemented in the territory of another State where different rules applied. If it was felt that article 15 was binding or mandatory, then the problem was to decide whether the parties could agree not to apply article 15 in a particular State but rather to apply it in another State.

41. The solution might be to refer to the matter in the Guide instead of including article 15 in article 3. That way, each State could decide for itself, when adopting the law, whether to include a reference to article 15 in article 3. Another possible scenario would be to include article 15 in article 3, but to add a footnote to the effect that when adopting the law, States might decide for themselves whether or not to maintain the reference to article 15 in article 3.

42. **Mr. Sekolec** (Secretary of the Commission) said that it appeared from the discussion that the English text of draft article 15 said something different than the French text. The French text spoke of "executory force", which had to do with a procedural aspect of the settlement agreement, whereas the English text spoke of the binding and enforceable nature of a contract. It might be necessary to change the French text.

43. **Mr. Zanker** (Observer for Australia) said that he had thought that draft article 15 was complete as it stood, ending "that settlement agreement is binding and enforceable". The words "as a contract" had been dropped, but the terms used implied a contract. For the reasons stated by the United Kingdom and the United States, his delegation was not in favour of a reference to draft article 15 as a mandatory provision in draft article 3.

44. **Mr. Möller** (Observer for Finland) said that if draft article 15 was considered to be in a partial state, requiring completion by the particular State, that was another reason for not mentioning it as mandatory in draft article 3, since the Commission could not know what it would contain in its final form. The absence of a reference would not make a practical difference. If the parties did not wish to have a settlement agreement that was binding and enforceable, any arrangement they made was not a settlement agreement in the strict sense of the term.

45. **Mr. Shimizu** (Japan) said that his delegation was opposed to the inclusion of a reference to draft article 15 in draft article 3. It had been left to the particular State to decide whether draft article 15 should be mandatory or not. An explanation in the Guide to Enactment should resolve the problem.

46. **The Chairman** suggested that a solution might be reached by analysing the elements of draft article 15 separately to determine whether they might be subject to variation by agreement or not. To say that the settlement agreement was binding was merely to follow the law of contracts and could hardly be altered. To say that it was enforceable might lead to a consideration of legal procedures, although in Mexican law "ejecutorio" meant little more than "vinculante"; "ejecutivo" would have stronger implications.

47. **Mr. Barsy** (Sudan) said that it seemed natural to refer to draft article 15 in draft article 3. Parties resorted to conciliation when a dispute had arisen under law, with the intention that a settlement agreement should be enforceable; otherwise, conciliation was meaningless. No cases had come to his attention in which the parties did not want to have an enforceable agreement.

48. **Mr. Tang** Houzhi (China) said that his delegation strongly supported the inclusion of a reference to draft article 15 in draft article 3. The essential purpose of elaborating a model law was to make a conciliation settlement agreement enforceable; that was what made conciliation worthwhile. He himself had not encountered cases in which the parties did not wish their agreement to be enforceable. The example cited by the United Kingdom delegation of parties' bringing in a third party to help them work out a strategy did not involve a dispute and could not be considered a conciliation proceeding. Some delegations argued that making enforceability mandatory might discourage some parties from resorting to conciliation, but he felt that, on the contrary, parties would be dissuaded from conciliation if the resulting agreement was not binding and enforceable, because of the waste of time and energy involved.

49. With regard to consistency between language versions, the Chinese, at least, was clear and gave an accurate rendering of the English terms "binding and enforceable". It was his understanding that the wording

of draft article 15 had been approved, even though the matter in brackets would be left to each State to fill in. Therefore, there was no reason to defer a decision on a reference to it in draft article 3. Failure to make draft article 15 mandatory would deprive the Model Law of much of its significance. To ensure consistency, draft footnote 4, which said that an enacting State might consider the possibility of an enforcement procedure being mandatory, should perhaps be looked at again.

50. **Mr. Heger** (Germany) said that, given the uncertainties surrounding draft article 15, his delegation did not think that a reference to it should be included in draft article 3.

51. **Mr. Kovar** (United States of America) stressed that, in the view of his delegation, to deny the parties the option of entering into any kind of settlement agreement they wanted would undermine the purpose of the Model Law. The essence of conciliation was that it was a voluntary process, intended to enable parties to reach their own resolution of their dispute. They might simply agree, for example, to take certain steps to restore confidence in their business relationship. The situation described by the United Kingdom delegation could well arise from a contract dispute and be considered conciliation. If every accord reached by the parties had to take the form of a binding contract or the equivalent of an arbitral award or judgement, it would severely limit party autonomy, which was the essence of conciliation.

52. His delegation was unclear about the link between the choice of law problem raised by France and variation by agreement, but he suspected that it was a point that should be addressed under national law. As other delegations had pointed out, draft footnote 4 left an enacting State the option of making enforcement procedures under draft article 15 mandatory.

The meeting rose at 6 p.m.

United Nations A/CN.9/SR.747

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United Nations Commission on International Trade Law

Thirty-fifth session

Summary record of the 747th meeting
Held at Headquarters, New York, on Friday, 21 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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02-43603 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.15 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.2)

1. **Mr. Sekolec** (Secretary of the Commission), summarizing the most recent changes to the draft Model Law, said that a definition of "conciliator" had been added to article 1. Articles 5 and 6, as they appeared in the annex to document A/CN.9/506, were to be merged as article 5 under a new title "Number and appointment of conciliators".

2. In the italicized text of the new article 14 (former article 15), contained in document A/CN.9/XXXV/CRP.2, "may insert" had replaced the word "inserts" in the earlier text. Extensive discussion of the phrase "binding and enforceable" had revealed that those concepts were not interpreted uniformly in enacting States. In some regimes, "binding and enforceable" were qualities which characterized any type of contract, whereas elsewhere, the expression had an executory connotation, suggesting that a plaintiff could go directly to an official charged with enforcing judgements or awards.

3. In the former article 15 (A/CN.9/506, annex), some delegations considered the mention of the word "sign" to be superfluous as there was no requirement, for instance under common law, that a settlement agreement should be signed. It was therefore decided that the words "reach and sign" should be replaced with "conclude".

4. **The Chairman** recalled that during earlier informal consultations a few delegations had insisted that the requirement of a signature should appear in the text of the draft Model Law. In the same vein, other participants had attached great importance to the concept of "binding and enforceable". He urged the Working Group to express their opinions on both the inclusion of "enforceable" and on the requirement that the agreement should be signed.

5. **Mr. Morán Bovio** (Spain) said he agreed that delegations which had been involved at earlier stages of negotiation should provide clarification on the genesis of article 15, specifically with respect to discussions held on the signing of the agreement and on the concepts of enforceability or executability.

6. **Mr. Lebedev** (Russian Federation) said that in earlier discussions it had been considered useful to retain the concept of enforceability, along with the term "binding". It could be debated that "enforceable" might not be the most appropriate legal terminology but, in the opinion of those delegations which favoured its retention, the term would be useful to States enacting national laws based on the draft Model Law and would enable them, at their discretion, to establish special provisions and rules to ensure "enforceability" of such settlement agreements.

7. He fully agreed that the provision on "enforceability" and, by extension, the ability to implement settlement agreements were ultimately the goals of conciliation proceedings. He believed the term should not be replaced, nor was it rational to raise the issue of excluding it.

8. **Mr. García Feraud** (Observer for Ecuador) said that the discussion on the deletion of the word "sign" hinged on differences of interpretation between judicial systems. In some regimes, signature was regarded as extremely important, and it enabled a process to advance on the basis of an instrument that was executory in nature. It was however very difficult to reconcile various judicial systems which had evolved from different roots in resolving the same issues. In order to alleviate the concerns raised he suggested the following wording: "The settlement agreement should be signed if this is necessary in order to ensure its enforceability in respective judicial systems."

9. **Mr. Sekolec** (Secretary of the Commission) said that, as currently formulated, the suggestion might be appropriate for a treaty or guide to enactment, but not for a national law, which could not include wording to the effect that the agreement should be signed "if necessary".

10. **Mr. Tang** Houzhi (China) said that signature of a document was very important in Chinese law on procedure and arbitration. However, under contract law, contracts which had been concluded orally were equally valid and there was no requirement for a contract to be signed. Such conflicts existed in Chinese legislation. Since the draft Model Law was intended to operate internationally, his delegation believed that the word "conclude" would be appropriate.

11. As for the use of the expression "binding and enforceable", he said that "binding" referred to an effect on parties, whereas "enforceable" related to whether an agreement could be enforced by a court. A settlement agreement would naturally carry binding effect, but would not necessarily be enforceable. A party to a contract might choose not to implement the terms of the agreement, and if the case were brought before a court, that court would need to investigate whether a breach had been committed. If a settlement agreement were not enforceable, parties would question the usefulness of recourse to a conciliator, rather than to a court. The word "enforceable" was quite appropriate and reflected the opinions of most delegations during the discussions of the Working Group. The former article 15 itself, as contained in document A/CN.9/506, was applicable to a number of situations and could therefore be usefully retained.

12. **Mr. Graham** (Mexico) agreed that the interpretation of the expression "binding and enforceable" differed among legal systems and said that the expression agreed upon should take into consideration either a broad defence for the party against which enforcement is being sought, or a more limited defence. Based on the experience of serious proposals put forward by delegations, it was probably not possible to reach agreement on the wording at the beginning of the former article 15, as legislative differences created stumbling blocks for such agreement.

13. In the absence of a compromise, his delegation suggested that any party could present agreements before a judge seeking enforcement. To that end, he proposed the following text: "If the parties reach [and sign] an agreement settling a dispute, any of the parties is entitled to submit the agreement before a court for its enforcement." In the draft Guide to Enactment the Working Group would indicate possible defences and the types of procedure involved.

14. **Ms. Beleva** (Observer for Bulgaria) said she agreed with the Observer for Ecuador that the reference to signing should be retained, since in some legal systems, a written agreement was a *sine qua non*. Although many States had entered reservations in that connection to the United Nations Convention on Contracts for the International Sale of Goods, the Commission was drafting a model law, not a convention, and flexibility was thus of the essence. A reference to national legal systems could be included in the Guide, and it would thus be for legislators to determine how best to ensure enforceability.

15. **Ms. Mangklatanakul** (Thailand) said that Thai contract law mostly required a signature, whether handwritten or electronic. She would thus be in favour of retention of the reference to signing, whether in the formulation "conclude and sign where necessary", in an explanatory footnote, or in the Guide.

16. **Mr. Barsy** (Sudan) said that he would not object to deletion of the word "sign", since it would still be for the State to determine the conditions for enforceability. It was important to recall that other national laws might also be applicable. If a conciliation agreement required enforcement by a court or tribunal, a number of problems would arise, not least if one of the parties had reached the agreement by fraudulent means. A conciliation agreement submitted to a judge would, moreover, be treated as would any contract between the parties, thus reducing the usefulness of the Model Law.

17. **Mr. Cosman** (Canada) said he agreed with the representative of China that signing provided important proof that a settlement agreement had been reached. However, his delegation favoured the term "conclude", since it was important not to limit States in whose jurisdictions oral agreements were also binding. Although the representative of Mexico had described one possible means of enforcing an agreement, his proposed formulation should be placed in square brackets. The enacting State would then be left to determine the precise modalities.

18. **Mr. Heger** (Germany) said that he fully supported the Mexican proposal, since it allowed States to decide the question of enforcement, a matter normally governed by national law.

19. **Mr. Markus** (Observer for Switzerland) said that translation of the term "enforceability" was not the only problem; the issue was further complicated by the multiplicity of procedures for enforcement that existed in different countries. Since enforceability was ultimately determined by national law, his delegation could, however, accept a degree of ambiguity in the provision. The formulation proposed by the representative of Mexico was acceptable, provided the term "enforcement" rather than "execution" was used. As for the formulation proposed by the Observer for Ecuador, it might also be included in square brackets,

provided the word "ensure" was replaced with the idea of supporting or strengthening.

20. **The Chairman** said that national legal systems had different mechanisms for enforcement, and the terminology problem made standardization virtually impossible. In some systems, the word "enforceable" was synonymous with "binding"; in others, it implied enforcement by a court or arbitral tribunal. He suggested that the meeting should be suspended for informal consultations.

The meeting was suspended at 11.25 a.m. and resumed at 12.10 p.m.

21. **Mr. Sekolec** (Secretary of the Commission), summarizing the outcome of the informal consultations, said that various approaches to drafting the provision had been suggested.

22. One approach was that even if an effort was made to improve the translation of "binding and enforceable", those concepts would inevitably assume different connotations within different legal systems. That fact could, however, be explained in the Guide, on the understanding that it would be for the legislators to determine the precise meaning of article 15.

23. It was undisputed that in many legal systems, a settlement agreement could be in any form in order for it to be binding and enforceable. Reference had been made to sales contracts, which could also be concluded in any form. Significantly, States that had entered a reservation to the United Nations Convention on Contracts for the International Sale of Goods to the effect that sales contracts must be in written form were in the minority. Moreover, such reservations did not require that the sales contract must be signed. It had also been pointed out that in some legal systems, depending on the content of the enforceability, a signature might be required.

24. A compromise formulation would read as follows: "If the parties conclude an agreement settling a dispute", with an explanation included in the Guide to the effect that in some legal systems there were form requirements and gradations of those form requirements, with a signature requirement in some cases.

25. **Ms. Brelier** (France) said that the first sentence of article 15 should remain unchanged. The formulation proposed by the representative of Mexico might constitute the second sentence.

26. **The Chairman** said that the proposed formulation would be submitted to the drafting group for consideration, on the understanding that it would be included in square brackets.

27. *It was so decided.*

28. **Mr. Holtzmann** (United States of America) said that his delegation was reluctant to support the Mexican proposal, as it left the parties able to refer enforcement to a court, but ignored the cases in which, for example, enforcement could be achieved through a notary. The issue of entitlement to enforcement, and the issue of the vehicle for such enforcement, could best be accommodated at the end of article 15, where the enacting State had the opportunity to specify enforcement arrangements. If the term "enforceable" was problematic from the point of view of a number of languages and legal systems, he suggested that it should be deleted.

29. **Mr. Möller** (Observer for Finland) echoed the reluctance of the United States delegation to support the Mexican proposal, saying that the method of achieving enforcement was a matter for individual States' legal systems. It was better to tackle the issue of how and where enforcement would be achieved through the opportunity for the enacting State to add detail at the end of the article, or by inserting details in the Guide. He also supported deleting the term "enforceable", since if it remained in the text, each State would place its own interpretation on it.

30. **Mr. Barsy** (Sudan) said that although some legal systems did not provide for settlement agreements to be voluntarily enforceable, others did. The Commission needed to establish the conditions under which courts would have a role, and it was better to use the opportunity to add country-specific details at the end of the article in question than to adopt the Mexican proposal, as it failed to accommodate national differences in enforceability conditions.

31. **Mr. Tang** Houzhi (China) said that in the interests of expediting the Commission's work, his delegation had several observations. Firstly, it strongly felt that the term "enforceable" should not be deleted, as that would be tantamount to deleting the whole of article 15. Secondly, the issue of the term "enforceable" itself was one of form rather than substance. If the settlement agreement was treated as a contract, and there were enforcement variations, no difficulties would be created. Thirdly, as the

UNCITRAL Secretary had pointed out, the text on the table had been discussed at length by the Working Group, so changes should only be made for compelling reasons.

32. **Mr. Joko Smart** (Sierra Leone) said that he supported the United States proposal to delete the term "enforceable", as some languages and legal systems would give it one meaning, while other legal systems and languages would give it another. It was not the business of the Model Law to determine which agreements should be enforceable; that task was performed by whatever national law was applicable. China's concern at that proposed deletion was not justified: leaving the term "binding" would be sufficient, and the courts could determine what steps were needed.

33. **Mr. Jacquet** (France) said that he was very grateful for the United States delegation's suggestion in favour of deleting the term "enforceable", showing that it understood the difficulties it held for French-speaking countries. However, after some thought, the troublesome French translation "*exécutoire*" had been abandoned in favour of "*susceptible d'exécution*", which rendered the sense of "enforceable" without posing problems of interpretation.

34. **Mr. Lebedev** (Russian Federation) advocated keeping the term "enforceable" in draft article 15, as the problems of translating it into French, Spanish and Russian in a way that did not cause problems of legal interpretation seemed to have been solved. The Commission was not trying to decide how to translate the principle into action, but simply to make the principle itself obligatory.

35. **Mr. Lefebvre** (Canada) said that his delegation shared the view of the United States and other delegations of the Mexican proposal. The problem was that other public officers, such as notaries, and not just the courts, could be involved in enforcing agreements. The French proposal to use an alternative French translation of "enforceable" had his support.

36. **Mr. Meena** (India) said that before judging the words used, the Commission should look at their legal consequences. "Binding" meant "binding between the parties to the agreement", while "enforceable" referred to the fact that in cases of non-compliance, a party could go to court to force compliance. As the parties had elected to submit their dispute to conciliation, it would be pointless to go to court unless such action was unavoidable.

37. **Mr. Markus** (Observer for Switzerland) said that he agreed with the French solution of using an alternative translation of "enforcement".

38. **Mr. Holtzmann** (United States of America) said that his delegation had only suggested deleting the term "enforceable" to eliminate the problems of linguistic and legal interpretation that seemed to have arisen. If those problems had been eliminated, it was happy to withdraw its previous suggestion. It backed the Commission Secretary's proposal to replace the term "sign" in draft article 15 with the term "conclude".

39. **The Chairman** said that the original text proposed by the drafting group would be retained, but the term "sign" would be replaced with the term "conclude". The drafting committee would tackle the issue of translating the term "enforceable" in a suitable way, and explanations would be inserted in the Guide where appropriate. The Commission returned to consideration of retaining a footnote to article 15, or adding article 15 to the list of articles contained in article 3 which could neither be excluded nor varied.

40. **Mr. Jacquet** (France) said that he wished to further develop his delegation's argument for adding article 15 to the list of articles which could neither be excluded nor varied. The first argument in favour of such a step was logic. The content of article 15 as it currently stood made it unique, as it made settlement agreements between parties "binding and enforceable". Allowing it to be excluded or varied by not including it in the list in article 3 was like saying that something was obligatory in one breath, and saying that it was not obligatory in the next.

41. The second argument in favour was substance. Conciliation could have a variety of outcomes, of which genuine agreements were only one. A balance needed to be struck between leaving options open for the parties (the principle of party autonomy) and eliminating the impact of article 15. If the parties wished to consider that the settlement they had reached was not an agreement within the meaning of article 15, they should be free to state that. However, that did not mean that article 15, which did cover a substantial number of settlement agreements, should be stripped of its significance: on the contrary, it should be strengthened.

The meeting rose at 1 p.m.